SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 593

LOUIS BALTHAZAR and DORETTA BALTHAZAR, his wife,

Plaintiffs-Appellants,

vs.

MARI, LTD., an Illinois corporation, and ALLAN L. BLAIR; JOHN BOYLE, Chief Judge of the Circuit Court of Cook County, Illinois, as representative of all chief judges of Circuit Courts in the State of Illinois,

Defendants-Appellees.

On Appeal from a Decision of a Three-Judge Court of the District Court of the Northern District of Illinois, Eastern Division

REPLY IN SUPPORT OF JURISDICTIONAL STATEMENT

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REPLY IN SUPPORT OF JURISDICTIONAL STATEMENT

RESPONDENT RELIES ON CASES OF THIS COURT WHICH GIVE THE DELINQUENT TAXPAYER AN OPPORTUNITY FOR A PUBLIC SALE FROM WHICH HE MAY RECEIVE THE SURPLUS VALUE. THE ILLINOIS SYSTEM, WITHOUT THIS SUBSTANTIVE RIGHT, IS UNCONSTITUTIONAL.

Respondent relies on *King* v. *Mullins*, 171 U.S. 404 (1898) (Resp. Br. p. 9). But in the *King* case this Court

upheld a West Virginia forfeiture statute which provided for a public sale with any surplus value over existing tax liability to the owner, accord *Kentucky Union* v. *Kentucky*, 219 U.S. 140 (1911) (Resp. Br. p. 9). It is the lack of this substantive element that makes the Illinois statutory scheme confiscatory and unconstitutional.

Both *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232 (1890) and *Palmer* v. *McMahon*, 133 U.S. 660 (1890) (Resp. Br. p. 9) dealt with questions of notices, hearing, or other procedural, not substantive, due process questions. Petitioner here agrees, for purpose of this petition, that he received notice.(*) But all of the notice in the world would not entitle the State of Illinois to use its confiscatory powers, and to do so for the benefit of a private person, and take the value of petitioners' property in excess of his full tax delinquency (including costs and interest), in violation of the due process clause of the Fourteenth Amendment.

(*) The notice in Illinois is directed only at giving the delinquent owner time within which he can redeem from a tax purchase. As set out in the opening brief, however, that purchase is not a public sale and there is no bidding above the amount of the tax delinquency against the value of the land. There is no auction once the redemption period is closed, as in the cases cited by respondent here, and respondent concedes that there is no possible opportunity for a delinquent taxpayer to ever receive the surplus value of his property over his tax delinquency. Thus "notice" in Illinois does not go to aid a delinquent owner if he fails to redeem a delinquency but gives what the three judge court termed a "windfall" of the surplus value under a "harsh" law to a stranger.

In the cases relied upon by respondent this Court upheld state taxing statutes that allowed for forfeiture only where there was (a) notice of and (b) the opportunity to, recover the surplus value over the delinquency.

In *Nelson* v. *New York*, 352 U.S. 103 (1956) (Resp. Br. 10-11) the state statute provided opportunity for the property owner to plead, and obtain, surplus value at a public sale. If the owner failed to plead the surplus value, it went to the state, for the public benefit, and not as in Illinois, to a private party.

The cases cited by respondent support the arguments in favor of relief prayed by petitioner (on behalf of himself and all other persons similarly situated).

Respectfully submitted,

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APPENDIX

CRITICAL ANALYSIS OF CASES CITED BY RESPONDENT

The cases of *King* v. *Mullins*, 171 U.S. 404 (1898); *Kentucky Union* v. *Kentucky*, 219 U.S. 140 (1911); *Bell's Gap Railroad* v. *Pennsylvania*, 134 U.S. 232 (1890); and *Palmer* v. *McMahon*, 133 U.S. 660 (1890) all involved questions of procedural due process. The issue before the Court in those cases was not whether the state could take certain property to satisfy taxes; the issue was whether the state followed fair procedures in taking the property such as adequate notice and an opportunity to be heard. Procedural due process is not the issue in the instant case—appellants, for purposes of this petition, acknowledge that they received adequate notice and were given an opportunity to be heard. Appellants' asserted right is substantive; even if the state had given appellants a thousand notices and a thousand hearings the state would still not be entitled to absolutely deprive appellants of the surplus value of their property. Were appellees' argument accepted the state could constitutionally sentence a man to death for stealing a loaf of bread as long as the man was given adequate procedural safeguards.

King v. *Mullins*, *supra*, is clearly not authority for the constitutionality of the taxing scheme challenged in the instant case. Quite the contrary, the implication of the *Mullins* decision is that the Illinois system is unconstitutional.

In *Mullins*, a person whose claim rested on a chain of title running from a state grant of 500,000 acres sued in ejectment to oust persons claiming title pursuant to a state taxing statute because of a confusing series of such large land grants west of the Appalachian Mountains. The State of West Virginia was unable to keep an accurate record of lands available for taxation. By the State Constitution of 1872, the state declared that all parcels in excess of 1,000 acres which had not been registered on county tax books for five successive years were forfeited to the state.

During the years plaintiff's predecessors held title to the 500,000 acre tract, it had remained unregistered for more than five years and had been sold to the defendants' predecessors in interest. Appealing from a lower court judgment for the defendants, plaintiff claimed that the state law providing for forfeiture was unconstitutional in that no opportunity for a hearing was provided. The question being raised before the court was one of procedural due process and not the substantive questions presented in the instant case.

The Supreme Court affirmed a judgment for defendants because the delinquent owner was given an opportunity after the forfeiture to redeem his property during the judicial sale. Parenthetically, the Court emphasized that even where the owner did not redeem, the owner had an opportunity to bid at the judicial sale and if some other person was a highest bidder the owner was entitled to the surplus over the existing tax liability. 171 U.S. at 425. The Court considered such a system constitutional.

It is just such a system as described in *King* v. *Mullins* that Illinois fails to provide. Unlike West Virginia, the owner cannot bid at the sale; unlike West Virginia the owner, if he fails to redeem, is deprived of the opportunity to receive the surplus value of his property. Consequently, the *Mullins* decision casts no shadow on plaintiffs' claim; indeed, the emphasis of the Court implies that the West Virginia system (the opportunity of the owner to receive surplus value) may constitute a constitutional minimum.

Similarly, *Kentucky Union* v. *Kentucky*, *supra*, impliedly rejects the constitutionality of the Illinois taxing scheme. While the *Kentucky Union* case is of significant historical interest, it clearly does not hold that the state can deny the landowner an opportunity to recover the surplus value. The states of Kentucky and Virginia had granted large land patents to land speculators in the 18th and 19th centuries. Many of these grants conflicted with one another and many grantees had failed to register their property for taxes.

Like the West Virginia statute in *King* v. *Mullins*, 171 U.S. 404 (1898) the Kentucky statute provided for forfeiture of land which had not been placed on county tax rolls. An additional aspect of the bill attempted to clear up conflicting titles between Virginia and Kentucky grantees by conveying the property to the grantee in possession. What appellees fail to note is that the Kentucky statute provided that where the landowner had been delinquent in payment of taxes and where the land was to be forfeited to the state, the land was to be sold at public sale to the highest bidder and that the surplus after taxes, penalties and costs was to be paid to the delinquent owner. (Sec. 7 of the Kentucky Act discussed

at 219 U.S. 147). Thus, Kentucky like West Virginia, in *King* v. *Mullins, supra*, required a public sale at which the delinquent owner was given an opportunity to recover the surplus value. Unlike either West Virginia or Kentucky, Illinois prohibits the owner who fails to redeem the opportunity from receiveing the surplus value of this property.

Bell's Gap R. Co. v. *Pennsylvania*, *supra* and *Palmer* v. *McMahon*, *supra* have no bearing on the issue raised here. In *Bell's Gap*, a corporation had been forced to collect taxes owed on the corporation's bonds by the owners of the bonds. The corporation argued that the bondholders had not received notice of the tax and consequently procedural due process had been denied. In rejecting this argument this Court noted that specific notice of the amount of the tax was contained in the statute and no further notice was required. Unlike the instant case, the issue in *Bell's Gap* was not what the state could take but the procedure by which it took.

In *Palmer*, the taxpayer had participated in an administrative challenge to the amount of the tax assessed against him. He received a reduced assessment and did not seek to appeal the new assessment. Upon his refusal to pay the new assessment the taxing authority brought contempt proceedings against him which resulted in his incarceration. In appealing his jailing the taxpayer argued that he had been denied due process by not being allowed to challenge the amount of the tax at the contempt hearing. The court held that the taxpayer had been given adequate opportunity for such challenge at earlier proceedings and that the requirements of procedural due process had been satisfied.

Unlike the instant case the taxpayer in *Palmer* was raising a procedural rather than a substantive issue. He was not arguing that jailing itself was unconstitutional; he simply contended that the procedure which led to the jailing was wrong. Here, appellants do not challenge the *procedure* of taking surplus value; they challenge the taking itself.

The crucial distinction between *Nelson* v. *New York*, 352 U.S. 103 (1956) and the instant case is that the taxpayer who failed to redeem within the statutory period in New York was entitled to a public sale where he could receive the surplus proceeds; Illinois automatically confiscates the surplus value for the benefit of real estate speculators.

In *Nelson*, the City had (because of unpaid water bills) foreclosed on two parcels of real estate owned by plaintiff. The state foreclosure statute allowed the City to retain the property or sell it and retain the entire proceeds. The City had sold one parcel for $7,000 where the outstanding water charge was $75 and kept the surplus. It had also retained a second parcel valued at $46,000 where the water charge was $814.60.

The plaintiff sued to recover the property arguing, inter alia, that the City's failure to pay plaintiffs the surplus over the debt was an unconstitutional taking. In answer, the Court distinguished the situation presented by the instant case where the owner who cannot redeem is absolutely barred from recovery of surplus value. The Court said, "But we do not have here a statute which absolutely precludes an owner from obtaining surplus proceeds." 352 U.S. 110. The New York appellate courts had construed the New York forfeiture statute to allow

an owner to plead that the value of the property exceeded the existing liability. Where such a pleading was made, a special sale was conducted and the owner received any surplus. 352 U.S. 110.

Thus, in *Nelson*, unlike the instant case, the delinquent owner, though unable to pay his tax liability, could potentially receive the surplus value (market value-liability). In Illinois, the statute specifically precludes the opportunity for surplus value because the amount of the bids is restricted to the tax liability plus a percentage penalty.

Nelson differs from the instant case on one other ground. In *Nelson*, though the owner didn't receive the surplus value (because he did not ask for it at the proper time), the City, a public body, not a private person, retained the benefit. To justify the deprivation of the owner, the City could possibly argue that the surplus value was used for the public weal. In Illinois, the statute, in specifically setting a bidding maximum at or near the existing tax liability, automatically transfers the surplus value to a private person without any public benefit.